

YAVAPAI COUNTY ATTORNEY'S OFFICE  
JOSEPH C. BUTNER SBN 005229  
DEPUTY COUNTY ATTORNEY  
255 East Gurley Street  
Prescott, AZ 86301  
Telephone: 928-771-3344  
[ycao@co.yavapai.az.us](mailto:ycao@co.yavapai.az.us)

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IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

Division 6

STATE'S RESPONSE TO DEFENDANT'S  
MOTION TO PRECLUDE TESTIMONY  
OF EXPERTS PURSUANT TO ARIZONA  
RULE OF EVIDENCE 702  
FILED APRIL 9, 2010

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits its Response to Defendant's Motion to Preclude Testimony of Experts Pursuant to Arizona Rule of Evidence 702 and requests that Defendant's Motion be denied. The State's position is supported by the following Memorandum and Points of Authority.

MEMORANDUM OF POINTS AND AUTHORITIES

*I. Lay Testimony of Cmdr. Mascher, Det. Kennedy and Sgt. Winslow.*

Defendant claims the observations of the law enforcement witnesses in this case constitutes expert testimony "[b]ecause and average untrained lay person would not share this experience," Defendant's Motion to Preclude Testimony of Experts Pursuant to Arizona Rule of Evidence 702 dated and filed April 9, 2010, Pg. 10:24-26, and asks that the Court

1 require that these witnesses be qualified as experts. This blatant distortion of the plain  
2 language of *Arizona Rules of Evidence*, Rules 701 and 702 must be summarily rejected.

3 Rule 701 provides that:

4 If the witness is not testifying as an expert, the witness'  
5 testimony in the form of opinions or inferences is limited to  
6 those opinions or inferences which are (a) rationally based on  
7 the perception of the witness and (b) helpful to a clear  
8 understanding of the witness' testimony or the determination of  
9 a fact in issue.

10 In contrast, Rule 702 provides that where "scientific, technical, or other specialized  
11 knowledge will assist the trier of fact to understand the evidence or to determine a fact in  
12 issue, a witness qualified as an expert by knowledge, skill, experience, training, or education,  
13 may testify thereto in the form of an opinion or otherwise." As to lay witness identification  
14 of impression evidence, the Arizona Supreme Court long ago determined that lay "witnesses  
15 should [be] permitted to state the facts observed by them, as, the size of the tracks as  
16 compared with the shoes, the peculiarities of the shoes indicated in the tracks, the  
17 measurements, etc., and [leave] any deductions or conclusions to be drawn by the jury." *Lee*  
18 *v. State*, 27 Ariz. 52, 62, 229 P. 939, 924 (1924).

19 These lay witnesses will offer testimony regarding their observations of the bicycle  
20 tire tracks and the two sets of shoe impressions discovered at the scene. Observation  
21 evidence is not scientific or technical and does not require specialized knowledge; however,  
22 the evidence will assist the jury. Moreover, on February 19, 2010, this Court ruled that it  
23 would "permit lay witnesses, trained witnesses and officers to testify about their  
24 observations." (See Exhibit A, Minute Entry dated February 19, 2010.) This ruling  
25 specifically applies to the lay witness testimony pursuant to Rule 701 of *Cmdr. Mascher, Det.*  
26 *Kennedy and Sgt. Winslow*. Defendant's proposition that these witnesses must be qualified

1 as experts to offer testimony regarding their observations is unsustainable under the plain  
2 language of Rule 701 and 702 and must be rejected.

3 **II. Expert Testimony of DPS Criminalist John Hoang, FBI Agent Eric Gilkerson, and**  
4 **YCSO Cmdr. Scott Mascher.**

5 Defendant acknowledges that *Frye* is not applicable to comparison type testing. *See*  
6 *State v. Murray*, 184 Ariz. 9, 29, 906 P.2d 543, 562 (1995); *see also State v. Runningeagle*,  
7 176 Ariz. 59, 859 P.2d 169, 179 (1993). Yet, in spite of the plethora of long-standing case  
8 law on the issue, Defendant argues that the issue of comparison testing falling outside of  
9 *Frye* must be reevaluated and argues that the testimony of these experts should be precluded  
10 due to the lack of rigorous testing and scientific support in the areas about which they will  
11 testify. Defendant also claims there is an unacceptable risk that the jurors will fail to  
12 understand the limited reliability of the evidence. Defendant's arguments fail on several  
13 fronts.  
14

15 First, all three of the listed experts have had significant training in their respective  
16 fields. Rule 702 provides that where "scientific, technical, or other specialized knowledge  
17 will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness  
18 qualified as an expert by knowledge, skill, experience, training, or education, may testify  
19 thereto in the form of an opinion or otherwise." Each of these witnesses will "indicate that  
20 his training and experience qualify him to render enlightened opinions and draw  
21 sophisticated conclusions from the particular type of evidence available." *State v. Dixon*, 153  
22 Ariz. 151, 155, 735 P.2d 761, 765 (1987) (citation omitted).  
23

24 Second, expert opinion on tracking and foot impression and other comparison  
25 identification have been found to be reliable.  
26

1 As the Third Circuit stated in *United States v. Carter*,  
2 “expert testimony aiding the jury in making [shoe print]  
3 comparisons has long been judged admissible by the federal  
4 courts.” 176 Fed.Appx. 246, 249-50, 2006 WL 1004384, at \*3  
5 (3d Cir.2006) (citing *United States v. Rose*, 731 F.2d 1337,  
6 1345-47 (8th Cir.1984)). Other circuits have come to the same  
7 conclusion. See, e.g., *United States v. Ross*, 263 F.3d 844, 846  
8 (8th Cir.2001) (holding there was no error in admitting expert  
9 testimony by a FBI forensic examiner that “footprints ... found  
10 in the snow at the scene of one of the bank robberies” matched  
11 the footwear seized from the defendant's car); *United States v.*  
12 *Hendershot*, 614 F.2d 648, 654 (9th Cir.1980).

13 *United States v. Graves*, 465 F.Supp.2d 450, 459-60 (2006); See also *State v. Murray*, 184  
14 Ariz. 9, 906 P.2d 543 (1995), *United States v. Havvard*, 260 F.3d 597 (7<sup>th</sup> Cir. 2001) (The  
15 district court recognized that establishing the reliability of fingerprint analysis was made  
16 easier by its 100 years of successful use in criminal trials).

17 Thirdly, the jurors will have the opportunity to examine the evidence for themselves  
18 to determine the weight and credibility of the comparison evidence. Defendant’s claim of  
19 unacceptable risk due to the potential that the jurors will fail to understand the evidence and  
20 testimony is nothing more than pure speculation.

21 **A. DPS Criminalist John Hoang**

22 Mr. Hoang has over a thousand hours of training in identification of tire tracks. He  
23 will offer testimony regarding the results of his examinations of the photographs of the  
24 bicycle tracks taken at the scene, the bicycle tire tracks made by law enforcement using the  
25 tires of Defendant’s mountain bike and the tires from that bicycle. In his report, Hoang  
26 concluded that “[s]imilar tire tread patterns exist between the tire tracks depicted in the  
images ... and the front and rear bicycle tires,” (See Exhibit B, Scientific Examination  
Report, Bates 3242-3245.) and that the tires could have made the tracks in the photographs.  
Hoang also stated a more conclusive association could not be made due to the “limited clarity

1 and proper scale in the images.”

2 **B. Eric Gilkerson**

3 Eric Gilkerson is a Forensic Examiner with the FBI who has over ten years  
4 experience conducting footwear examination. In *United State v. Ford*, 481 F.3d 215, 217 (3<sup>rd</sup>  
5 Cir. 2007), Mr. Gilkerson offered expert testimony “that three partial shoeprints lifted from  
6 the counter in the bank were similar to the type of imprints that would be made by the shoes  
7 that Ford was wearing when he was apprehended.” After a hearing pursuant to *Daubert v.*  
8 *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, (1993), the District Court  
9 determined “the expert shoeprint testimony was based on valid specialized knowledge and  
10 would aid the jury in making comparisons between the soles of shoes found on or with the  
11 defendant and the imprints of soles found on surfaces at the crime scene.” *Id.* at 218.  
12

13 In particular, the District Court evaluated the  
14 “reliability of the methods and reliability of their application to  
15 the case at hand to determine ... whether there is a suitable fit  
16 between the proffered opinion and the facts of the case and,  
17 second, whether the opinion will be of assistance to the jury.”  
18 The Court found that there was general acceptance of shoeprint  
19 analysis in both the federal courts and the forensic community,  
20 the theory has been subject to peer review and publication, the  
21 potential error rate is known, and there are standards and  
22 techniques commonly employed in the analysis. The Court  
23 agreed that **Gilkerson** followed the recognized techniques.

24 *Id.* at 218-19 (emphasis added).

25 Mr. Gilkerson has determined that the shoe impressions at the scene are most  
26 comparable with a sole present on only three models of La Sportiva shoes. La Sportiva shoes  
are not common; only four stores in all of Arizona sell this brand of shoe. The Pike’s Peak  
model, which Defendant purchased in 2006, is no longer available through typical retailers and  
only 3800 pairs of the Pike’s Peak model were sold in all of North America. The fact that

1 Defendant purchased a pair of these shoes and that it appears that this type of shoe "closely  
2 correspond with" the impressions left outside Carol's home is pivotal.

3       Whereas the State will elicit the same type of testimony from Mr. Gilkerson as he  
4 offered in *Ford* to establish the reliability of shoe tread comparison, his expert testimony  
5 should not be precluded.

6  
7       **C.     *Cmdr. Scott Mascher.***

8       Cmdr. Masher has over twenty-five years experience in law enforcement and has  
9 been with the Yavapai County Sheriff's Office since 1986. His previous assignments include  
10 Commander of the Detention Services Division, supervisor of Field Patrol, undercover  
11 operations, Criminal Investigations and he was a member and commander of the Special  
12 Weapons And Tactics (S.W.A.T.) and Hostage Negotiations Teams. Cmdr. Mascher is also  
13 an expert tracker.

14       The State anticipates that Cmdr. Mascher will give testimony regarding the numerous  
15 sets of tracks that were discovered on the ranch land behind the Bridal Path residence. This  
16 will include information about the tracks of the victim, the bicycle tracks, and the shoes  
17 impressions along side the bicycle tracks, specifically the order in which the tracks were laid  
18 down. Cmdr. Masher will also give his expert opinion testimony regarding the tracks to and  
19 from the area where the bicycle was stashed. Tracking evidence "is sufficiently beyond  
20 common experience that the opinion of an expert would assist the trier of fact." *State v.*  
21 *Dixon*, 153 Ariz. 151, 155, 735 P.2d 761, 765 (1987); *see also State v. Dickey*, 125 Ariz. 163,  
22 169, 608 P.2d 302, 308 (1980).

23       The State has acknowledged that Cmdr. Masher will not attempt to identify the shoe  
24 impressions with the shoes provided by La Sportiva; however, Cmdr. Masher will give  
25  
26

1 testimony regarding his observations of both sets of shoe impressions and his conclusion  
2 "that the patterns were similar." This type of testimony is allowed under *State v. Amaya-*  
3 *Ruiz*, 166, Ariz. 152, 168, 800 P.2d 1260, 1276 (1990).

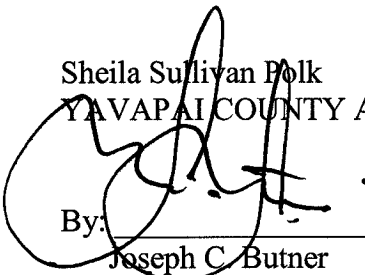
4 **CONCLUSION:**

5 Here, none of Defendant's claims are supported by law. The anticipated testimonies of  
6 John Hoang, and Eric Gilkerson are based upon physical comparison and physical  
7 comparisons do not involve scientific methods or tools. "*Frye* is inapplicable when 'expert  
8 *evidence is in the nature of physical comparisons* as opposed to scientific tests or  
9 experiments.'" *State v. Richards*, 166 Ariz. 576, 578, 804 P.2d 109, 111 (App. 1990)(citations  
10 omitted)(emphasis added). As *Frye* has no applicability to the issues at hand, Defendant has  
11 no standing to challenge its constitutionality.

12 Rule 701 clearly allows law enforcement to offer testimony as to their personal  
13 observations. More importantly, this Court has ruled that it would allow such testimony.  
14 Defendant's Motion to Preclude Testimony of Experts Pursuant to *Ariz. R. Evid.*, Rule 702  
15 must be denied.

16  
17  
18  
19 RESPECTFULLY SUBMITTED this 19<sup>th</sup> April, 2010.

20  
21  
22 Sheila Sullivan Polk  
YAVAPAI COUNTY ATTORNEY

23  
24 By:   
25 Joseph C. Butner  
26 Deputy County Attorney

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Office of the Yavapai County Attorney

255 E. Gurley Street, Suite 300

Prescott, AZ 86301

Phone: (928) 771-3344 Facsimile: (928) 771-3110

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COPIES of the foregoing delivered this  
19th day of April, 2010 to:

Honorable Thomas J. Lindberg  
Division 6  
Yavapai County Superior Court  
(via email)

John Sears  
511 E.. Gurley St.  
Prescott, AZ 86301  
Attorney for Defendant  
(via email)

Larry Hammond  
Anne Chapman  
Osborn Maledon, P.A.  
2929 North Central Ave, 21<sup>st</sup> Floor  
Phoenix, AZ  
Attorney for Defendant  
(via email)

By: Debb Cornell